85-1188

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. KENT, JR.,
Petitioner,

vs.

SANBORN COOPERATIVE GRAIN COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Donald W. Bird
Alene V. Haskell
HUSCH, EPPENBERGER, DONOHUE,
ELSON & CORNFELD
100 North Broadway, Suite 1800
St. Louis, Missouri 63102
(314) 421-4800
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

36 pp

QUESTIONS PRESENTED

1. Whether a creditor-bidder-tenant with respect to property sold by a trustee in bankruptcy is bound by the terms of an order confirming a sale of the property it occupies to a third party, or is able to attack the terms of the order in a proceeding to enforce the order.

2. Whether a state statute granting a state agency the power to establish rental conditions between lessees and successors to the trustee in bankruptcy fails in light of the purpose of the Bankruptcy Code to maximize the estate for creditors.

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
I. The decision of the Court of Appeals conflicts with other circuits by holding that the substance of a judgment may be appealed, where the appeal is from an order effectuating the judgment	4
II. The decision of the Court of Appeals undermines the finality of bankruptcy sales by permitting a tenant-creditor-bidder to collaterally attack the terms of an order confirming a sale by the trustee	5
III. The Court of Appeals' holding that the bankruptcy code does not preempt a state rent establishment statute which applies specifically to purchasers from a bankruptcy trustee, and which effectively eliminates the Trustee's ability to sell estate property for fair market value directly conflicts with the decisions of this Court	5
Conclusion	7
Appendix:	
A. *In the Matter of: Chicago, Rock Island and Pacific Railroad Company, Debtor,* 772 F.2d 299 (7th Cir. 1985) (Wood, dissenting)	A-1

B. *In re: Chicago, Rock Island and Pacific Railroad Company,* No. 75 B 2697, (N.D. Ill. August 21, 1984) A-11

C. *In the Matter of: Chicago, Rock Island and Pacific Railroad Company, Debtor,* order denying rehearing A-17

D. Order of November 1, 1983 ..... A-19

E. Iowa Code §327G.62 ..... A-21

TABLE OF AUTHORITIES

Cases:

Ferguson v. Illinois Central Railroad Co., 210 N.W. 604 (Iowa 1926) 7

International Manufacturing Co. v. Landon, Inc., 327 F.2d 824 (9th Cir. 1964) 4

Matter of Chicago, Rock Island and Pacific Railroad Co., 753 F.2d 56 (7th Cir. 1985) 4, 5

Matter of Boston & Marine Corp., 596 F.2d 2 (1st Cir. 1979) 4

New Haven Inclusion Cases, 399 U.S. 392 (U.S. 1970) .. 6

N.L.R.B. v. Bildisco and Bildisco, 104 S.Ct. 1188, 79 L.Ed.2d 482 (U.S. 1984) 6

Northwestern Transportation v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 6

Ohio v. Kovacs, 105 S.Ct. 705, 83 L.Ed.2d 649 (Jan. 9, 1985) 6

Perez v. Campbell, 402 U.S. 637 (1971) 6

Statutes and Rules:

11 U.S.C. §205(o) 2, 3

28 U.S.C. §1254(1) 2

Iowa Code §327G.62 ..... 2, 3, 4, 6, 7

Fed. R. App. P. 4 ..... 2, 3

Fed. R. Civ. P. 52 ..... 2, 3

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. KENT, JR.,
Petitioner,

vs.

SANBORN COOPERATIVE GRAIN COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Robert L. Kent, Jr. respectfully prays that a writ of certiorari issue to review the Opinion and Order of the United States Court of Appeals for the Seventh Circuit entered on this proceeding on August 28, 1985.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 772 F.2d 299.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on August 28, 1985. A timely Petition for Rehearing En Banc was denied on October 3, 1985, and this

Petition for a Writ of Certiorari was filed within 90 days thereafter. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 U.S.C. §205(o) (1976)

Fed. R. App. P. 4(a)

Fed. R. Civ. P. 52

Iowa Code §327G.62 (1983)

STATEMENT OF THE CASE

On June 2, 1980, the District Court ordered that the Chicago, Rock Island, and Pacific Railroad Company cease operation and that its assets be liquidated. For decades, the Rock Island had leased railroad right-of-way property to Iowa grain elevator companies at below market rates to encourage use of rail transport. The court ordered the trustee to sell the right-of-way properties for fair market value. The trustee initially approached the lessees for bids to purchase the properties they occupied; however, because the bids were unacceptably low, the trustee sought outside bidders.

In response, the grain elevator companies supported and the Iowa legislature passed a statute purporting to permit the Iowa Department of Transportation to set rental conditions between lessees of the trustee and any purchasers of property from the trustee. Iowa Code §327G.62 (contained in House File 2334).

Sanborn Cooperative Grain Company was one of the lessees. Sanborn unsuccessfully bid to purchase the property it occupied; Petitioner successfully bid. The Trustee petitioned the District Court to confirm the sale free of "any claim or right of any person, firm, corporation, or governmental authority under

House File 2334, Sixty-Ninth General Assembly of Iowa". The Trustee served upon Sanborn a copy of the Petition and a Notice of Hearing thereon; however, Sanborn did not object to the proposed order, or appear at the hearing on November 1, 1983. The District Court entered the confirmation order holding §327G.62 inapplicable to the property, pursuant to 11 U.S.C. §205(o). Sanborn did not appeal from the terms of the Order within the time period provided by Fed.R.Civ.P. 52 and Fed.R.App. P. 4.

Sanborn's notice of the order notwithstanding, the company filed for rental determination by the Iowa Department of Transportation. Petitioner moved to dismiss, based upon the District Court's order; nonetheless, the agency set an annual rent of two percent of the investment, locking Petitioner into an annual net loss of over $13,000.00, and gave the tenant the right to renew or purchase the property after five years. Petitioner sought and obtained an order from the District Court to effectuate its prior judgment by ordering Sanborn to desist from pursuit of remedies under the state statute. The validity of this Order is at issue here.

Sanborn appealed. The Iowa Department of Transportation intervened on behalf of Sanborn. Chicago Pacific Corporation, successor to the trustee, intervened on behalf of Mr. Kent. The United States Court of Appeals for the Seventh Circuit reversed, holding that it possessed jurisdiction to consider the validity of the November 1, 1983 exemption from the statute, and that the bankruptcy code did not preempt application of §327G.62 of the Iowa Code.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Conflicts With Decisions of Other Circuits by Holding That the Substance of a Judgment May be Appealed, Where the Appeal is From an Order Effectuating the Judgment.

The District Court's confirmation Order preempting §327G.62 was entered on November 1, 1983. Sanborn, despite notice and the opportunity to be heard, did not appeal the order, which provided that the Iowa rent statute would not apply. A confirmation order is a final, appealable order. *Matter of Chicago, Rock Island and Pacific Railroad Co.*, 753 F.2d 56, 58 n. 3 (7th Cir. 1985). Sanborn was a creditor, tenant on the property sold, and an unsuccessful bidder. Sanborn failed to object or appeal until after the court entered an enforcement order; therefore, the Court of Appeals lacked jurisdiction to determine the propriety of the exemption contained in the original Order.

In *Matter of Boston & Marine Corp.*, 596 F.2d 2, 9 (1st Cir. 1979), the court held that New Hampshire could not raise the propriety of a reorganization court's order to dismantle rail lines, for the reason that New Hampshire had failed to appeal the order giving conditional approval to dismantle the lines. The opinion in this case directly conflicts with *Boston & Marine* — the Court holds here that an interested party need not seek review of an appealable order.

The Court of Appeals, by permitting Sanborn to raise the validity of the District Court's November 1, 1983 Order, permits a collateral attack on that Order, in direct conflict with *International Manufacturing Co. v. Landon, Inc.*, 327 F.2d 824 (9th Cir. 1964). *Landon* held that the terms of an injunction could not be collaterally attacked by appealing from a motion to dissolve that injunction, for the reason that the terms of the original order were conclusive on the parties. 327 F.2d at 825. The Seventh Circuit took precisely the opposite position herein.

II. The Decision of the Court of Appeals Undermines the Finality of Bankruptcy Sales by Permitting a Tenant/Creditor/Unsuccessful Bidder to Collaterally Attack the Terms of an Order Confirming a Sale by the Trustee.

The Court of Appeals' holding that it had jurisdiction to review the terms of an order substantially beyond its appeal time generally undermines the interests of judicial finality, and specifically creates substantial uncertainty as to the title conveyed by bankruptcy trustees.

In this case, Sanborn was a creditor, a bidder, and a lessee of the property conveyed pursuant to the order of November 1, 1983. A confirmation order is appealable. *Matter of Chicago, Rock Island, and Pacific Railroad Co.*, 753 F.2d 56, 58 n. 3 (7th Cir. 1985). The opinion of the Court of Appeals improperly concluded that the order was not appealable by anyone other than the buyer or seller.

This holding eliminates certainty as to title conveyed by the trustee. If parties who are affected by and have notice of the terms of such orders are able to ignore the orders and forum shop to attack such orders, the concepts of finality and the plenary authority of the reorganization court over property of the debtor are undermined.

III. The Court of Appeal's Holding That the Bankruptcy Code Does Not Preclude Application of a State Rent Establishment Statute Which Applies Specifically to Purchasers From a Bankruptcy Trustee, and Which Effectively Eliminates the Trustee's Ability to Sell Estate Property to Anyone Other Than Current Lessees, Directly Conflicts With Decisions of This Court.

The Seventh Circuit held that there was insufficient justification for the District Court's finding that federal law pre-empted application of the Iowa rent establishment statute. First, the

opinion applies an improper standard of review. As a reorganization court, the District Court is entitled to exercise a great deal of discretion. If there is any warrant for its action, the District Court must be affirmed. *New Haven Inclusion Cases,* 399 U.S. 392, 439 (U.S. 1970). Had the Court of Appeals applied this standard, it would have affirmed the District Court.

The opinion of the Court of Appeals, furthermore, is contrary to the opinion of this Court in *Ohio v. Kovacs,* 105 S.Ct. 705, 83 L.Ed.2d 649 (January 9, 1985), holding that the bankrupt's duty to clean up hazardous wastes, imposed by a state court, constituted a dischargeable debt. Despite the valid state interest in cleaning up hazardous wastes, this Court affirmed the discharge of the debtor's obligation to do so, in furtherance of the bankruptcy goal of providing the debtor a fresh start. In this case, similarly, the goals of an orderly disposition of estate assets and maximization of the estate for the benefit of creditors require preemption of the Iowa law. The Seventh Circuit opinion herein also contradicts this Court's holding in *N.L.R.B. v. Bildisco and Bildisco,* 104 S.Ct. 1188, 79 L.Ed.2d 482 (U.S. 1984), reaffirming the primacy of bankruptcy goals.

The Seventh Circuit appeared to hold that the state law was not preempted on the ground that it was not facially unconstitutional. The decision of the Court of Appeals conflicts with this Court's holdings in *Northwestern Transportation v. Kalo Brick & Tile Co.,* 450 U.S. 311, 317 (1981) and *Perez v. Campbell,* 402 U.S. 637, 649 (1971). As this Court has held, state law must fail in the face of application of the bankruptcy code where application of the state law has the effect of obstructing the purposes of the federal law. *Perez v. Campbell, supra,* at 648-49. In this case, the trustee acknowledged the impossibility of selling over four hundred parcels of property where prospective bidders would face rental conditions imposed by the state. As the trustee advised the court, no buyers other than the lessees would come forward under those circumstances. An analysis of Iowa

law requires invalidation as well. In the sole case where the Iowa Supreme Court considered the constitutionality of §327G.62, the Court held it unconstitutional. *Ferguson v. Illinois Central Railroad Co.*, 210 N.W. 604, 607 (Iowa 1926). Thus, the Court of Appeals improperly concluded that §327G.62 did not fail in light of the Bankruptcy Code.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the Seventh Circuit.

Respectfully submitted,

Husch, Eppenberger, Donohue,
Elson & Cornfeld
Alene V. Haskell
100 North Broadway, Suite 1800
St. Louis, Missouri 63102
(314) 421-4800

Attorneys for Petitioner

APPENDIX

APPENDIX A

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 28, 1985

Before

Hon. Harlington Wood, Jr., Circuit Judge

Hon Frank H. Easterbrook, Circuit Judge

Hon. Edward Dumbauld, Senior District Judge*

No. 84-2572

In the Matter of:
Chicago, Rock Island and Pacific
Railroad Company,
Debtor.

Appeal of:
Sanborn Cooperative Grain
Company, Sanborn, Iowa.
Iowa Transportation Regulation
Authority,
Party-Intervenor.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 75 B 2697 #39
Judge Frank J. McGarr

---

* The Honorable Edward Dunbauld, Senior District Judge of the Western District of Pennsylvania, is sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2572

In the Matter of
Chicago, Rock Island and
Pacific Railroad Company,
Debtor,

Appeal of
Sanborn Cooperative Grain Co.
Sanborn, Iowa,
Appellant.

Appeal from the United States District Court
For the Northern District of Illinois
Eastern Division
75 B 2697 #39—Frank J. McGarr, *Chief Judge*

Argued April 15, 1985—Decided: August 28, 1985

Before WOOD and EASTERBROOK, *Circuit Judges* and DUMBAULD*, *Senior District Judge.*

DUMBAULD, *Senior District Judge.* The defunct Rock Island railroad still supplies grist for the judicial mill. In the case at bar the question presented is whether the application of Iowa rent control laws to property purchased by a landlord from the

---

* The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, sitting by designation.

bankruptcy trustee liquidating the railroad is precluded by reason of conflict with any federal policy designed to maximize the selling price of a bankrupt's assets. Finding no conflict between applicable Iowa law and federal policy under the Supremacy Clause (Art. VI, cl. 2 of the U.S. Constitution), we reverse the contrary holding of the District Court.

Appellant, Sanborn Cooperative Grain Company, operated a grain elevator at Melvin, Iowa, on 4.4 acres of land leased from the trustee of the Chicago, Rock Island and Pacific Railroad Company. Valuable improvements on the land had been erected by appellant. After rejecting appellant's offer of $16,308.58 for the land, the trustee accepted the bid of Robert L. Kent, Jr. of $120,000.00 for the 4.4 acres together with other real estate located at Goodell, Iowa. As stated in Judge McGarr's opinion in the instant case, "For reasons not known to the court, Kent allocates $100,000 of his purchase price to Melvin and $20,000 to Goodell." The District Court's Order No. 621, on November 1, 1983, confirmed the sale of both properties to Kent "free of liens and other claims including ... any claim or right of any person, firm, corporation or governmental authority under House File 2334, Sixty-Ninth General Assembly of Iowa."

"House File 2334" seems to be a reference to recent Iowa legislation, one of whose provisions (identified as Iowa Code § 327 G. 78), according to the District Court "requires a railroad or its successor to offer its property adjacent to its right-of-way to its lessee who, if not satisfied with the offered price, can apply to" the Iowa Transportation Regulation Authority. "The Authority would make a final determination of the fair market value of the property and that determination would be binding on the parties."

The District Court held by its opinion of July 11, 1983, that § 327 G. 78 was "preempted by the federal bankruptcy laws under which this reorganization court has operated in this matter."

Thereafter the sale was confirmed, as stated above, on November 1, 1983, free and clear of any claim under §327 G. 78.

No appeal was taken from the District Court's decisions of July 11, 1983 and November 1, 1983, and their correctness is not in question before us.[1] The present appeal is from the order of August 21, 1984, which deals with a *different* Iowa statutory provision (§ 327 G. 62, also contained in "House File 2334"). This provision empowers the Transportation Regulation Authority to "fix the terms and conditions of rental between a railroad or its grantee and the lessee of property adjacent to a railroad right-of-way."

As the District Court recognized, there are "significant differences" between the proceeding involving § 327 G. 78 decided on July 11, 1983, and the instant case seeking to nullify action of the Iowa Authority under § 327 G. 62: "the previous case involved the proposed sale *by the Trustee* allegedly incontravention of section 327 G. 78. The instant case does not directly involve the Trustee; rather, it involves, in its purest sense, a private rental dispute between a property owner and his tenant." [Italics those of the District Court]. In that dispute, as the District Court also points out, a ruling has already been made by the Iowa Authority, which the landlord seeks to set aside, with reference to "land once owned by the Trustee."

Thus the crux of the case at bar is whether the fact that the land involved was formerly held by the Trustee and sold by him

---

[1] It seems fairly obvious, however, that to require a Trustee charged with sale of a bankrupt's property for the benefit of creditors to delay disposition of the assets until a State agency fixes their value (a value binding on all parties, including presumably the Trustee, and constituting the ceiling for his sale) would surely constitute a more substantial interference with the Trustee's federal function of liquidating the bankrupt estate than would result from the application of Iowa's rent control laws to landlord-tenant disputes regarding property no longer part of the bankrupt estate.

to the present landlord should suffice to preclude operation of Iowa's rent-control law. We are not satisfied that a sufficient showing has been made to sustain such a result.

The [illegible]ty of State regulation of grain elevators as a business "affected with a public interest" has been settled law ever since *Munn v. Illinois*, 94 U.S. 113, 125-32 (1876). Familiar also are the rent control laws customary in war time, and continuing to this day in New York City and perhaps elsewhere in places suffering a shortage of rental housing. *Bowles v. Willingham*, 321 U.S. 503, 517-18 (1944). As there said by the Supreme Court "Of course, price control, the same as other forms of regulation, may reduce the value of the property regulated. But ... that does not mean that the regulation is unconstitutional." Similarly, the fact that prospective bidders might offer more if they could use the land bought from a bankrupt railroad's trustee for a barroom or brothel rather than for a grain elevator does not establish an overriding federal policy prohibiting traditional forms of State regulation of rents.

The District Court, after holding the ruling of the Iowa Authority invalid, went on to say that: "Any rental dispute which remains between Kent and Sanborn can properly be adjudicated by this Court."

With respect to the interim period between the purported cancellation of Sanborn's lease by the trustee on November 1, 1982, up until the date of sale by the trustee to Kent, approved by the District Court on November 1, 1983, there would appear to be no reason why the District Court should not fix the rent for that period, in accordance with the agreement of the parties referred to in the District Court's opinion: "The parties also agreed to ask this Court to fix the rent for the interim period ..."

Such a procedure was approved by our remand for reconsideration of a similar interim rate of rental in a previous *Rock Island* case, *Appeal of Farmers Cooperative Elevator, Rake,*

Iowa, 753 F.2d 56, 58, 60 (7th Cir. 1985). As there held, the rental must be based on unimproved value of the land, when the tenants own or have constructed the improvements (such as a grain elevator). We there noted that under Iowa law, the trustee could not enjoy the windfall of making himself owner of the improvements, simply because the lessee did not remove them within ten days, when the lessee continued to occupy the property with the trustee's acquiescence. (753 F.2d at 59). We stated that:

> Under choice-of-law principles applicable in railroad reorganization, we look to the law of the state in which the real property is located to determine the applicable principles of property law. See *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 654 F.2d 1218, 1221-23 (7th Cir. 1981); *In re Boston & Maine Corp.* 596 F.2d 2, 7-8 (1st Cir. 1979). The property of concern in this case is located in Rake, Iowa, therefore the Iowa law provides the framework for our analysis.

The same rule is applicable in the case at bar. Likewise the Supreme Court in *Butner v. U.S.*, 440 U.S. 48, 55 (1979), declared that:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy." *Lewis v. Manufacturers National Bank*, 364 U.S. 603, 609. The justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests, including the interest of a mortgagee in rents earned by mortgaged property.

In accordance with that line of reasoning we are convinced that, within federal constitutional limits, it is for State law and policy to determine what degree of regulation of rents is appropriate to protect the public interest and the economic welfare of a region vitally dependent upon farming and the efficient functioning of grain elevators in order to assure its meaningful participation in the national and world market for agricultural products.

We now consider other arguments advanced in support of the District Court's ruling. It is contended that the case at bar is a collateral attack on the November 1, 1983, order confirming the sale. There is no merit to this contention. The validity of the sale has not been challenged and is not before us. The sale is consummated and complete. The present controversy is between other parties. It is *res inter alios* insofar as the Trustee is concerned.[2]

Nor is the instant order really a means of enforcing the order confirming the sale. It is really an order relating to a proceeding under a different statutory provision under Iowa law. At most the District Court's declaration that it "must" have intended to strike down *everything* contained in "File 2334" would be *obiter dictum* and *brutum fulmen*. It is an elementary maxim of our legal system that a court decides only the case before it, and can not render advisory opinions disposing of other issues not presented for decision.

A good illustration of this principle is found in *Champlin Refining Co. v. U.S.*, 329 U.S. 29, 32 (1946), where the Supreme Court held that a pipeline which was deemed to be a common carrier by virtue of 49 U.S.C. §1(3)(a) could be compelled to supply a valuation report required of such carriers by

---

[2] Of course we intimate no opinion as to what remedies, if any, Kent may have (such as recission of the sale) if he can prove that the Trustee told him orally to forget all about Iowa laws.

49 U.S.C. § 19a. Yet the Court later held in *U.S. v. Champlin Refining Co.*, 341 U.S. 290, 295-96, 303 (1951), that the company could not be compelled to file tariffs required of such carriers by 49 U.S.C. § 6.

Other questions discussed by counsel need not be resolved now. Thus whether application of Iowa law results in confiscation or deprivation of property without due process of law or taking for a non-public use are issues not ripe for decision here or necessary to disposition of the case at bar. Iowa courts provide judicial review of decisions of the Transportation Regulation Authority, and presumably will apply whatever federal criteria and standards of constitutionality are currently applicable to issues of confiscation or regulation or taking for public use, subject to appropriate subsequent federal review.

For the foregoing reasons the decision of the District Court is REVERSED.

WOOD, *Circuit Judge,* dissenting. I respectfully dissent because I believe this appeal was untimely filed with regard to the preemption issue and therefore this court does not have jurisdiction to decide that issue.

The appellant asks us to decide two issues on this appeal: (1) whether Iowa Code section 327G.62, Iowa's rent control law, is preempted by federal bankruptcy law; and (2) whether the district court judge has jurisdiction to determine rent for the Iowa property. The majority takes jurisdiction over the first issue but not the second. I do not think we have jurisdiction to entertain either. In my view Chief Judge McGarr first decided the preemption issue in his November 1, 1983 order (Order No. 621), wherein he confirmed the trustee's sale of the Chicago, Rock Island and Pacific Railroad Company's properties in Melvin and Goodell, Iowa to Kent "free of liens and other claims (including ... any claim or right of any person, firm, corporation or governmental entity under House File 2334)." All parties agree that House File 2334 includes Iowa Code section

327G.62.[1] Therefore, if Sanborn wished to appeal the issue whether federal bankruptcy law preempts section 327G.62, it should have timely filed an appeal from the November 1, 1983 Order No. 621. Instead Sanborn chose to forum shop. It went to the Iowa Transportation Regulation Authority and obtained a ruling setting rent and circumventing Order No. 621. Not until after the Authority ruled in Sanborn's favor and Kent returned to Chief Judge McGarr and obtained an order entered August 21, 1984 directing compliance with Order No. 621 did Sanborn file the current appeal raising the section 327G.62 preemption issue which was originally decided on November 1, 1983. That appeal, filed as it was on October 29, 1984, is untimely to the extent it seeks to overturn Order No. 621's decision on preemption, which was entered in 1983. *See* F.R.A.P. 4 (parties have thirty days from the entry of judgment by district courts to file appeals in civil cases).[2]

I therefore respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[1] Lest there was any confusion on the meaning of Order No. 621 Judge McGarr, in his August 21, 1984 order directing compliance with Order No. 621, stated that the order's reference to House File 2334 "is broad enough to encompass *all* of House File 2334, which includes section 327G.62 .... Order No. 621 cannot be read only to preclude claims under section 327G.78."

[2] As the majority correctly points out, the second issue, whether the district court has the authority to determine rent, is not ripe for decision because the district court judge did not actually determine rent in his August 21, 1984 order, only that he had the authority to determine rent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In Re:
Chicago, Rock Island and Pacific
Railroad Company,
Debtor.

MEMORANDUM OPINION AND ORDER

On November 1, 1983, this court entered Order No. 621 confirming the sale of real estate at Melvin and Goodell, Iowa by the trustee of the Chicago, Rock Island and Pacific Railroad Company ("Trustee") to Robert L. Kent, Jr. ("Kent") for $120,000 pursuant to solicitation of bids on said properties. Both properties were under lease at the time of the sale. After the sale was confirmed, Kent proposed lease terms to both lessees. The Goodell lessee chose to vacate; the Melvin lessee, Sanborn Cooperative Grain Company ("Sanborn"), remained in occupancy and requested a written proposal of the lease terms. At the heart of the matter currently before the court is the dispute between Kent and Sanborn over the proposed lease terms. The sequence of events preceding the current petition will put the issue in focus.

On March 1, 1979, the Trustee entered into a lease with Sanborn for the Melvin property which cancelled a previous lease dated May 1, 1977. Annual rental under the 1979 lease was set at $1,760. The 1979 lease provided that either party may terminate the lease on thirty days' written notice. On September 7, 1982, the Trustee exercised his thirty-day cancellation clause to terminate the lease as of November 1, 1982, unless Sanborn agreed to an annual rental of $29,400, which purportedly reflected the property's current value.

Sanborn neither paid the rent nor vacated the property. The lease, however, was not terminated as of November 1, 1982; rather, after a series of stays and injunctions, an agreement was reached between Sanborn and the Trustee, confirmed in a January 17, 1983 letter from Sanborn's counsel to the Trustee's counsel, holding in abeyance the rent increases during the negotiations between Sanborn and the Trustee for Sanborn's purchase of the Melvin property. The parties also agreed to ask this court to fix the rent for the interim period at the time the purchase contract was submitted for approval.

The court is unaware of any further action between Sanborn and the Trustee involving the rent increase prior to the sale of the real estate which, as has become apparent, was to Kent and not to Sanborn. Kent purchased the property pursuant to a solicitation of bids for three properties—Melvin, Goodell and Hardy. Kent's joint bid of $120,000 for the Melvin and Goodell properties was accepted; Sanborn's bid of $16,307.58 for the Melvin property was rejected. For reasons not known to the court, Kent allocates $100,000 of his purchase price to Melvin and $20,000 to Goodell. Order No. 621, which confirmed the sale of both properties to Kent, ordered the properties transferred "free of liens and other claims (including . . . any claim or right of any person, firm, corporation or governmental entity under House File 2334, Sixty-Ninth General Assembly of Iowa) . . . ." House File 2334 contains various new provisions and amendments regarding railroad property. One of the new provisions, Iowa Code § 327G.78, requires a railroad or its successor to offer its property adjacent to its right-of-way to its lessee who, if not satisfied with the offered price, can apply to the Transportation ("Authority"). The Authority would make a final determination of the fair market value of the property and that determination would be binding on the parties. In an opinion of this court dated July 11, 1983, section 327G.78 was held to be preempted by the federal bankruptcy laws under which this reorganization court has operated in this matter. It was held that the resultant losses to the estate would "impede

the congressional objective of promoting the preservation of a debtor's assets for the benefit of creditors." Mem. Op. & Order, July 11, 1983, at 6.

House File 2334 also contains an amendment to Iowa Code § 327.62, which gives the Authority jurisdiction to hear evidence and fix the terms and conditions of rental between a railroad or its grantee and the lessee of property adjacent to a railroad right-of-way. After Kent's purchase of the Melvin property, Kent proposed to Sanborn an annual rental of $27,600. Rather than accede to Kent's rental demand, Sanborn filed an application with the Authority for an order fixing the rent and terms of the Kent-Sanborn lease. Kent filed a motion to dismiss that proceeding with the Authority and in this court brought a petition to stay the Authority's proceeding. However, on May 2, 1984, the Authority ruled on the merits of Sanborn's application. The Authority held that this court's Order No. 621 did not preclude the Authority's jurisdiction and set rental terms as follows:

(1) A five-year lease with annual rent of $2,025 was set for the land alone on a net rental basis, which means that Sanborn would be responsible for property taxes, insurance, maintenance and repair.

(2) After five years, if the parties do not renew the lease, Sanborn can either purchase the property at a value set by an appraiser selected by Sanborn or vacate the premises and remove the improvements.

(3) If the parties do not terminate the lease, the lease automatically renews for an additional five-year term, with rent to be based on the tax assessment value of the property.

Kent's petition to stay the Authority's proceeding having been mooted, Kent brought a petition to direct compliance with Order No. 621 and an alternative petition to rescind the sale. The latter petition was withdrawn and later reasserted. The

Crown intervenors and later the newly-formed Chicago Pacific Corporation submitted memoranda in support of Kent's petition to direct compliance with Order No. 621, while the Authority joined Sanborn's resistance to the petition.

The issues before the court on that petition are (1) whether the reference in Order No. 621 to House File 2334 was intended to free Kent from the restrictions of Iowa Code § 327G.62, and (2) whether section 327.62 is preempted by the federal bankruptcy laws under which this court operates.

Although the reference to House File 2334 in Order No. 621 is not a model of clarity, it is broad enough to encompass *all* of House File 2334, which includes section 327.62, as amended to specifically apply to grantees and successors of railroads as well as to railroads themselves. Sanborn argues that since Kent believed his purchase was free of "arbitration" proceedings before the Authority, he could only have been referring to section 327G.78 which, according to Sanborn, provides for arbitration. However, both sections 327G.78 and -.62 are couched in virtually identical terms regarding the nature of the hearings; neither uses the term "arbitration." Thus, Order No. 621 cannot be read only to preclude claims under section 327G.78.

The second issue requires analogy to this court's July 11, 1983 memorandum opinion and order regarding section 327G.78. The court first notes two significant differences between the facts underlying that order and those of the instant case. First, in the previous case, the action was brought for declaratory judgment by a lessee of a portion of the Trustee's property being offered for sale; the instant case seeks, in effect, to set aside a ruling already made by the Authority pursuant to an application of a lessee on land once owned by the Trustee. Second, and more important, the previous case involved the proposed sale *by the Trustee* allegedly in contravention of section 327G.78. The instant case does not directly involve the Trustee; rather, it involves, in its purest sense, a private rental dispute between a property owner and his tenant.

It is exactly the indirect, underlying relationship of the Trustee to this dispute, however, which implicates this court's jurisdiction over this matter. According to Kent, representations made to him by the Trustee and his agents concerning the rental value and the inapplicability of the Iowa statutes were key to his decision to purchase the Iowa properties. This court lent its imprimatur to that understanding by exempting the properties at issue from the Iowa statutes in Order No. 621.

Moreover, the Trustee's ability to maintain his past sales of similar leased properties in Iowa and to engage in future sales of such properties is directly involved in this dispute. As stated by the Crown intervenors, "If the purchasers of this property cannot rely upon this court's order to protect them against the destruction of the value of their investments, the Trustee will be unable to sell any of this real estate at its market value." Crown Mem. in Support at 5. Thus, under the principles invoked in this court's July 11, 1983 memorandum opinion and order to hold section 327G.78 preempted by the federal bankruptcy laws, the court must now also hold section 327G.62 to be similarly preempted. To the extent that section 327G.62 can be used to interfere with the Trustee's ability to obtain the fair market value for this and other properties, this court's broad jurisdiction[1] over the debtor and its property is properly invoked. The ability of that section to interfere with the reorganization court's goals is manifest, *inter alia,* by Kent's alternative petition to rescind the sale of the Melvin property.

---

[1] Sanborn suggests that "[t]he Court's supervision and liquidation of the Rock Island will cease June 1, 1984. Any liquidation of the 'Estate' is now completed, and no liquidation by the Court or Trustee can be affected [sic?]." Sanborn Response Mem. at 2. The court calls Sanborn's attention, however, to the broad reservation of jurisdiction provided in the Consummation Order and Final Decree. *See* Order No. 678, § 7.03 (Apr. 19, 1984).

The court thus holds that section 327G.62 is preempted by the federal bankruptcy laws. Therefore, the ruling of the Authority made pursuant to Sanborn's application under that section is of no effect as against Kent. Any rental dispute which remains between Kent and Sanborn can properly be adjudicated by this court.[2]

For the foregoing reasons, Kent's petition to direct compliance with Order No. 621 is granted. Kent's alternative petition to rescind the sale is mooted.

ENTER:

/s/ Frank J. McGarr
United States District Judge

DATED: August 21, 1984

---

[2] A previous rental dispute between the Trustee and the Farmers Cooperative Elevator of Rake, Iowa was resolved by this court on May 4, 1983. That dispute involved a rent increase for similarly situated property, also encumbered, as is the Melvin property, by lessee-owned improvements. This court's determination of the rental value during the period between the Trustee's notice of termination of the lease and the approval of sale to the lessee was appealed to the Seventh Circuit. The matter was argued there on November 15, 1983, and awaits decision. The Seventh Circuit's decision in that matter will no doubt be instructive in this court's determination of rental value in the instant case.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

October 3, 1985

Before

Hon. Harlington Wood, Jr., Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Edward Dumbauld, Senior District Judge*

No. 84-2572

Chicago, Rock Island and
Pacific Railroad Company,
Debtor,

Appeal of
Sanborn Cooperative Grain Co.
Sanborn, Iowa,
Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
75 B 2697 #39
Frank J. McGarr, *Chief Judge.*

---

* The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, is sitting by designation.

Chief Judge Walter J. Cummings did not participate in any consideration of the petition for rehearing *in banc* filed in the above cause.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed on September 9, 1985, in the above-entitled cause by Respondent Robert J. Kent, Jr., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Proceedings for the
Reorganization of a Railroad.

No. 75 B 2697

In the Matter of
Chicago, Rock Island and
Pacific Railroad Company,
Debtor.

ORDER NO. 621 ON TRUSTEE'S PETITION FOR CONFIRMATION OF SALE PURSUANT TO SOLICITATION OF BID OF REAL ESTATE AT MELVIN AND GOODELL, IOWA (SAN-KLEM)

This cause coming on to be heard upon the Petition of William M. Gibbons, the Trustee, requesting an order for confirmation by the Court of the sale by the Trustee, free of liens and other claims, of all of his right, title and interest in the real estate at Melvin and Goodell, Iowa described in Exhibit 1 attached for the sum of $120,000 to Robert L. Kent, Jr. the detail of which is fully set forth and described in said Petition filed herein, and it appearing to the Court that all due notice of the pendency of said Petition was served upon all parties entitled to receive same, and the Court having heard statements of counsel and being fully advised in the premises finds that the sale of the aforesaid real estate at the price aforesaid will be in the interest of Debtor's estate.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the sale by William M. Gibbons, the Trustee herein, of the real estate at Melvin and Goodell, Iowa to Robert L. Kent, Jr. for $120,000 be and it is hereby confirmed.

2. That William M. Gibbons, the Trustee herein, be and he is hereby authorized to sell and convey by quitclaim deed, subject to the provisions of the Offer to Purchase attached to the Petition, to Robert L. Kent, Jr., free of liens and other claims (including tax liens or claims and any claim or right of any person, firm, corporation or governmental entity under House File 2334, Sixty-Ninth General Assembly of Iowa) all of his right, title and interest in the real estate described in Exhibit 1 attached and to execute and deliver a quitclaim deed for the total sum of $120,000 and any and all other documents necessary to consummate the said sale free of liens and other claims, including tax liens or claims and any claim or right of any person, firm, corporation or governmental entity under House File 2334, Sixty-Ninth General Assembly of Iowa.

3. That the rights, claims, liens and interest of the Trustee, the Debtor, The First National Bank of Chicago, Corporate Trustee under that certain First Mortgage dated as of January 1, 1950 and all Supplemental Indentures thereto and of all other claims in, upon or against the aforesaid property which is sold pursuant to this Order shall be transferred from said property to the net proceeds of such sale; and such proceeds of sale, until further order of the Court shall be segregated and deposited by the Trustee in a separate account bearing the designation "Real Estate Sales" at The First National Bank of Chicago and shall be invested in short term securities of United States Government.

DATED: Nov. 1, 1983

ENTER:

/s/ Frank J. McGarr
District Judge

APPENDIX E

Iowa Code § 327G.62

327G.62. Buildings or other improvements on railroad lands

When a disagreement arises between a railroad corporation, its grantee, or successor in interest and the owner, lessee, or licensee of any building or other improvement, including trackage, used for receiving, storing, transporting, or manufacturing any article of commerce transported or to be transported, situated on a present or former railroad right-of-way or any land owned or controlled by the railroad corporation, its grantee, or successor in interest, as to the terms and conditions on which the same is to be continued thereon or removed therefrom, the railway corporation, its grantee, or successor in interest or owner, lessee, or licensee may make written application to the authority and the authority shall hear and determine the controversy and make an order as shall be just and equitable between the parties, which order shall be enforced in the same manner as other orders of the authority.

Amended 1982.

Supreme Court, U.S.
FILED
JAN 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. KENT, JR.,
Petitioner,

vs.

SANBORN COOPERATIVE GRAIN COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

LEO E. FITZGIBBONS*
HAROLD W. WHITE
FITZGIBBONS BROTHERS
Attorneys at Law
108 North 7th Street
Estherville, Iowa 51334
(712) 362-7215

**Counsel of Record* *Attorneys for Respondent*

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Whether a creditor - bidder - tenant is required to appeal an order confirming sale of leased property by a railroad reorganization trustee prior to the time that the Reorganization Court has determined whether an Iowa rent control statute applies to the ownership of the property by the third party following the Trustee's conveyance.

2. Whether a purchaser of Iowa real estate from a railroad reorganization trustee is given a federal exemption from an Iowa rent control statute.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Statement of the Case	2
I. The Facts	2
II. Opinion of the District Court	3
III. Opinion of the United States Court of Appeals for the Seventh Circuit	4
Reasons Why the Writ Should be Denied	5
I. The decision of the Court of Appeals does not conflict with decisions of other Circuits as alleged in the Petition	5
II. The decision of the Court of Appeals does not affect the finality of bankruptcy sales as alleged by Petitioner	6
III. The Court of Appeals correctly held that the Bankruptcy Code would not give Petitioner immunity from Iowa's rent control statute following his purchase because he purchased the Iowa real estate from the Trustee rather than a railroad not in reorganization	6
Conclusion	9
Appendix:	
Iowa Code Section 327G.62 (1981) (Prior to 1982 Amendment)	A-1

TABLE OF AUTHORITIES

Page

Cases:

Chicago and North Western Transportation Company v. Kalo Brick & Tile Company, 450 U.S. 311 (1981) 8

Chicago, Rock Island and Pacific Railroad Company, Appeal of Farmers Cooperative Elevator, Rake, Iowa, 753 F.2d 58 (7th Cir. 1985) 3

Ferguson v. Illinois Central Railroad Co., 210 N.W. 604 (Iowa 1926) 9

International Manufacturing Co. v. Landon, Inc., 327 F.2d 824 (9th Cir. 1964) 6

Matter of Boston & Marine Corp., 596 F.2d 2 (1st Cir. 1979) 5

NLRB v. Bildisco and Bildisco, 104 S.Ct. 1188 (1984) .. 8

New Haven Inclusion Cases, 399 U.S. 392 (1970) 7

Ohio v. Kovacs, 105 S.Ct. 705 (1985) 7

Perez v. Campbell, 402 U.S. 649 (1971) 8

Statutes:

Section 327G.62 of the Iowa Code ..... *passim*

Section 327G.78 of the Iowa Code 3,5

House File 2334, Sixty-Ninth General Assembly of the State of Iowa, 1982 Session 3,5

No. 85-1138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. KENT, JR.,
Petitioner,

vs.

SANBORN COOPERATIVE GRAIN COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Because the decision of the United States Court of Appeals for the Seventh Circuit in this case follows applicable rulings of this Court and involves none of the criteria warranting review, Respondent Sanborn Cooperative Grain Co. (Sanborn) respectfully requests that this Court deny the Petition of Robert L. Kent, Jr. (Kent) for a writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of appeals for the Seventh Circuit is reported as *Chicago, Rock Island and Pacific Railroad Company, Appeal of Sanborn Cooperative Grain Co.*, 772 F.2d 299 (7th Cir., 1985). The Seventh Circuit reversed the

unreported decision of the United States District Court for the Northern District of Illinois. The two opinions appear as A-3-10 and A-11-16, respectively, to the Petition.

STATEMENT OF THE CASE

Petitioner seeks review of a decision holding that real estate purchased by the Petitioner from the Trustee of the Chicago, Rock Island and Pacific Railroad Company is not exempt from application of an Iowa rent control statute, Section 327G.62 of the Iowa Code.

I. The Facts

The pertinent facts of this case are those found in the Seventh Circuit's decision for this case. *Chicago, Rock Island and Pacific Railroad Company, Appeal of Sanborn Cooperative Grain Co.* (772 F.2d 299, 301, Pet. A-4). Sanborn operated a grain elevator at Melvin, Iowa, on land which it leased from the Chicago, Rock Island and Pacific Railroad Company. Following the Rock Island's reorganization under the Bankruptcy Act, Sanborn continued to lease the real estate from the railroad's Trustee.

During the long term it had leased the real estate from the railroad, Sanborn erected improvements on the leased land. After the Trustee refused Sanborn's offer to purchse the real estate which it was leasing, the Trustee sold the real estate to the Petitioner. In his Petition, Kent discusses the Iowa legislature's 1982 amendments to Iowa Code Section 327G.62. As shown by Iowa Code section 327G.62 prior to its 1982 amendments. (Opposition Appendix), the purpose of the 1982 amendment was to grant Iowa elevators, such as Sanborn, that had erected improvements on leased property during railroad ownership the same continuing rights if the railroad sold the leased real estate.

In his Petition, Kent alleges that the order confirming the Trustee's sale to Kent on November 1, 1983, was an adjudica-

tion on the merits of whether Kent's ownership of the real estate would be free from Iowa rent control, Section 327G.62. As the Court of Appeals found, House File 2334, Iowa General Assembly, contained multiple provisions; and prior to November 1, 1983, the only litigation before the Reorganization Court had concerned new section 327G.78 of the Iowa Code.

Petition also refers to proceedings before the Iowa Department of Transportation under Section 327G.62. The Iowa Department of Transportation's rent order based Sanborn's rent on the value of the unimproved real estate. The Iowa agency's rent order, using the vacant land value as the basis of rent, is the same approach approved by the Seventh Circuit in a related rent case involving the Rock Island Trustee. *Chicago, Rock Island and Pacific Railroad Company, Appeal of Farmers Cooperative Elevator, Rake, Iowa,* 753 F.2d 58, 60 (7th Cir. 1985).

In its opinion for this case, the Seventh Circuit stated that the issues concerning the constitutionality of the Iowa rent control statute, Section 327G.62, were properly determined by judicial review provided by the Iowa courts and the issues of State confiscation, regulation or taking could be raised there "subject to appropriate subsequent federal review". (772 F.2d 299, 303, Pet. A-9).

II. Opinion Of The District Court

In its opinion, the District Court stated that the issues were (1) whether its reference to House File 2334 in its confirmation order was "intended" to free Kent from application of the Iowa rent control statute and (2) whether Section 327G.62 is preempted by federal bankruptcy law. (Memorandum, Opinion and Order, Pet. A-14).

The District Court admitted that its "reference to House File 2334 in Order No. 621 is not a model of clarity", but found that the reference was "broad enough to encompass *all* of House File 2334." (Memorandum, Opinion and Order, Pet. A-14).

On the second issue, the Court conceded that this "case does not directly involve the Trustee; rather it involves, in its purest sense, a private rental dispute between a property owner and his tenant." (Memorandum, Opinion and Order, Pet. A-14). The district court accepted Kent's testimony that the Trustee's assurances to him that the Iowa rent control statute would not apply affected his decision to purchase the Iowa property. Also, the court adopted the Trustee's argument that application of the Iowa rent control statute would lower the value of the Trustee's Iowa property. (Memorandum, Opinion, and Order, Pet. A-15).

III. Opinion Of The United States Court Of Appeals For The Seventh Circuit

The Seventh Circuit reversed the conclusion of the district court on the issue of federal bankruptcy preemption, noting:

> It is for state law and policies to determine what degree of regulation of rents is appropriate to protect the public interest and the economic welfare of the region vitally dependent upon farming and the efficient functioning of grain elevators in order to assure its meaningful participation in the national and world market for agricultural products. (772 F.2d 299, 303, Pet. A-8).

The Appeals Court did not find the required federal interest or conflict with state law to justify preemption.

The Appeals Court also found that the present appeal was not an appeal from the court's November 1, 1983, order confirming sale, but was an appeal from the court's order of August 21, 1984, adjudicating for the first time that Iowa real estate purchased from the Trustee was, in the hands of the Trustee's purchaser, exempt from the Iowa rent control statute. (772 F.2d 299, 301, Pet. A-4-5).

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Decision Of The Court Of Appeals Does Not Conflict With Decisions Of Other Circuits As Alleged In The Petition.

Petitioner argues that the district court's confirmation order of November 1, 1983, was an adjudication of the application of the Iowa rent control statute and whether the statute would be enforceable against Petitioner following his purchase from the Trustee.

The Court's confirmation order sold the leased property to Petitioner "free of liens and other claims (including tax liens or claims and any claim or right of any person, firm, corporation or governmental entity under House File 2334, Sixty-Ninth General Assembly of Iowa)." (Order No. 621, Pet. A-20). The district court admitted that its reference to House File 2334 "is not a model of clarity." (Memorandum, Opinion and Order, Pet. A-14). The only litigation in the reorganization court before November 1, 1983, on House File 2334, concerned another section of the Statute (Iowa Code Section 327G.78). The application and constitutionality of the 1982 amendment to Section 327G.62 had not been litigated.

To support his argument that the decision of the Court of Appeals conflicts with decisions from other circuits, Petitioner cites *Matter of Boston & Marine Corp.*, 596 F.2d 2, 9 (1st Cir. 1979). In that case, this Court found that the State of New Hampshire could not raise arguments in subsequent litigation which "go to the merits of issues decided long ago by the reorganization court and the ICC." *Matter of Boston & Marine Corp.*, 596 F.2d 2, 9 (1st Cir. 1979). As the Court of Appeals found in the present case, the issue of constitutionality of Section 327G.62 and whether Petitioner purchased real estate from the Trustee free of the state rent statute had not been previously determined on the merits. Accordingly, the Court of Appeals decision in this case is not in conflict.

Also, the Court of Appeals decision does not permit a collateral attack on the November 1, 1983, Order and is not in conflict with *International Manufacturing Co. v. Landon, Inc.*, 327 F.2d 824 (9th Cir. 1964). As the Seventh Circuit found, the present appeal does not challenge the validity of the Trustee's sale to Petitioner. (772 F.2d 299, 303, Pet. A-8-9). The Seventh Circuit's opinion for this case does not conflict with the Ninth Circuit's opinion as alleged.

II. The Decision Of The Court Of Appeals Does Not Affect The Finality Of Bankruptcy Sales As Alleged By Petitioner.

The Petitioner argues that the Court of Appeals decision "creates substantial uncertainty as to the title conveyed by bankruptcy trustees." (Pet. 5). Sanborn did not appeal the confirmation order of November 1, 1983, and does not dispute Petitioner's ownership of its leased real estate at Melvin, Iowa.

Following Kent's purchase of the real estate from the Trustee, Sanborn requested that the Iowa Transportation Regulation Authority determine the rent payable to Kent as provided by Section 327G.62 of the Iowa Code. At that point, Kent petitioned the Reorganization Court to declare that he had purchased the Iowa real estate free of Iowa's rent control statute. The Court of Appeals agreed that the present appeal is not collateral and does not attack the November 1, 1983, Order confirming the sale to Kent. (772 F.2d 299, 303, Pet. A-8-9).

III. The Court Of Appeals Correctly Held That The Bankruptcy Code Would Not Give Petitioner Immunity From Iowa's Rent Control Statute Following His Purchase Because He Purchased The Iowa Real Estate From The Trustee Rather Than A Railroad Not In Reorganization.

The Seventh Circuit correctly found that Iowa's rent control statute was not preempted by federal bankruptcy law when the

dispute was whether Section 327G.62 of the Iowa Code would apply to a rent dispute between Sanborn and Kent *following* Kent's purchase of the real estate from the Trustee. Sanborn agreed to allow the district court to fix the rent owed by it to the Trustee which accrued prior to the November 1, 1983, sale to Kent by the Trustee. Sanborn did not seek application of section 327G.62 of the Iowa Code, 1985, to the rent it would owe the Trustee prior to Kent's purchase. (772 F.2d 299, 302, Pet. A-6-7).

Kent alleges that the Appeals Court employed "an improper standard of review." (Pet. 6). The discretion given to the district court as a reorganization court concerns the lower court's findings of fact. This Court has held that a railroad reorganization court's findings of fact are given special weight because of the lower court's familiarity with the reorganization case. *New Haven Inclusion Cases,* 399 U.S. 392, 463 (1970). The weight given the district court's findings of fact did not prevent the appeals court from reviewing the legal issue of federal preemption.

Petitioner compares the present case to *Ohio v. Kovacs,* 105 S.Ct. 705 (1985). In that case, this Court held that a debtor under Chapters 7 and 11 of the Bankruptcy Code was discharged from a state obligation that it clean up a waste site or be liable for damage assessments if it failed to do so. *Ohio v. Kovacs, supra,* concerns the issue of "debt" and the discharge of the debtor. The case does not concern application of state environmental laws to real estate in the hands of a purchaser from the debtor. This Court specifically held that bankruptcy would not prevent an "injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State's waters." 105 S.Ct. 705, 711. Accordingly, this Court did not hold that bankruptcy would grant continuing immunity to real estate from further enforcement of a State's environmental laws. As applied to this case, while there might be some question whether

Iowa could regulate the rent between Sanborn and the Trustee during the Trustee's ownership, federal law does not prohibit Iowa from regulating the real estate *after* its purchase by Kent and it passes from the Trustee's control. In addition, this Court's concurring opinion restates prior law that the determination of property rights is left to state law. 105 S.Ct. 705, 712 (O'Connor, J., concurring).

The Seventh Circuit's opinion does not contradict this Court's holding in *NLRB v. Bildisco and Bildisco,* 104 S.Ct. 1188 (1984). In that case, this Court considered whether a debtor in possession under Chapter 11 of the Bankruptcy Code could reject a collective bargaining agreement as an executory contract. In that case, this Court did not give any rejection rights *after* the bankruptcy when the business was operated by a purchaser from the Trustee. By citing the above cases of this Court, Petitioner seeks to cloak himself with limited federal protection from state law granted the Trustee or debtor in bankruptcy.

The decision of the Court of Appeals for this case does not conflict with this Court's holding in *Chicago and North Western Transportation Company v. Kalo Brick & Tile Company,* 450 U.S. 311, 317 (1981). In *North Western Transportation* the Court found a direct conflict between federal and state regulation of railroads and the ability of shippers to claim damages in railroad abandonment. There is no federal rent control statute to conflict with Iowa's statute. Traditionally and constitutionally, the regulation of real estate ownership is left to the individual states. Neither does the Seventh Circuit's opinion conflict with *Perez v. Campbell,* 402 U.S. 637, 649 (1971). Section 327G.62 of the Iowa Code does not interfere with the reorganized railroad's ability to have a "fresh start."

Sanborn's argument is that the Bankruptcy Trustee could receive a higher sale price for Iowa real estate if the Trustee could sell the real estate free from Iowa's rent control statute.

As the Court of Appeals noted, the fact that real estate could be sold for more if exempted from state regulation "does not establish an overriding federal policy prohibiting traditional forms of State regulation of rents." (772 F.2d 302, Pet. A-6).

In *Ferguson v. Illinois Central Railroad Co.*, 210 N.W. 604, 607 (Iowa 1926), the Iowa Supreme Court did not find Section 327G.62 to be unconstitutional. The Court found that there was not sufficient public interest in the regulation of rent charged to a coal shed owner to justify State rent control. As the Court of appeals noted in this case, Iowa's right to regulate grain elevators has been established in law for some time. (772 F.2d 299, 302, Pet. A-6).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Leo E. Fitzgibbons*
Harold W. White

FITZGIBBONS BROTHERS
Attorneys at Law
108 North 7th Street
Estherville, Iowa 51334
(712) 362-7215

Attorneys for Respondent
Sanborn Cooperative Grain
Company

*Counsel of Record

January 18, 1986

APPENDIX

APPENDIX

Iowa Code § 327G.62 (1981)

327G.62 Buildings on railroad lands.

When a disagreement arises between a railroad corporation and the owner of any building used for receiving, storing, or manufacturing any article of commerce transported or to be transported, situated on the railroad right of way or any land owned or controlled by the railroad corporation for railroad purposes, as to the terms and conditions on which the same is to be continued thereon or removed therefrom, such railway corporation or person may make written application to the board and the board shall hear and determine such controversy and make such order in relation thereto as shall be just and equitable between the parties, which order shall be enforced in the same manner as other orders of the board.

(Prior to 1982 Amendment.)